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FILE: [REDACTED]
SRC 04 107 53091

Office: TEXAS SERVICE CENTER Date: SEP 06 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time of filing, the petitioner was a doctoral student at Baylor College of Medicine. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner does not qualify for an exemption from the requirement of a job offer because his qualifications did not match those of witnesses who had written in support of the petition.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

In support of the petition, the petitioner submitted letters from several witnesses. These witnesses hold Ph.D. degrees. In denying the petition, the director stated:

[T]he beneficiary does not even possess the minimum qualifications of others in this field of expertise. The beneficiary possesses a Bachelors of Science degree in biochemistry and a Master of Science degree in molecular biology. While a person who holds a master's degree is not restricted from conducting research in any given field, the evidence in the record demonstrates that every one of the beneficiary's peers possesses a Ph.D. in the field of expertise. . . .

Additionally, the beneficiary is still pursuing (or at least at the time of filing) the minimum qualifications and knowledge in the field of expertise.

This being a national interest waiver petition, there is no specific job offer under consideration. The director admitted that "a person who holds a master's degree is not restricted from conducting research in any given field," a stipulation that wholly contradicts the director's conclusion that the petitioner lacks "the minimum qualifications" to work in his chosen field. Certainly, the petitioner's employment prospects will be broader after he receives a doctorate than before he receives it, but there is nothing in the statute, regulations, or case law to support the grounds for denial as worded by the director.

The director's finding was in error because the director failed to consider the merits of the petitioner's national interest claim, focusing instead on the fact that the petitioner had not yet completed his doctoral studies.

That being said, the director failed to acknowledge a major issue that prevents the approval of the petition. That issue concerns the petitioner's eligibility for the underlying immigrant visa classification. The petitioner must demonstrate that he qualifies for classification as either an alien of exceptional ability or a member of the professions holding an advanced degree.

The director, in rendering the decision, stated that the petitioner "possesses a Bachelors of Science degree in biochemistry and a Master of Science degree in molecular biology." This statement indicates that the petitioner qualifies as a member of the professions holding an advanced degree. The record, however, does not support this finding.

8 C.F.R. § 204.5(k)(3)(i) states that, to show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Here, the petitioner cannot satisfy 8 C.F.R. § 204.5(k)(3)(i)(B), because the petitioner has only about two years of actual post-baccalaureate employment experience. The regulatory reference to "employers" indicates that the experience in the specialty must take the form of employment experience rather than continued graduate study. The director's assertion that the petitioner holds a master's degree would, if true, satisfy 8 C.F.R. § 204.5(k)(3)(i)(A); but the record contains no official academic record, or any other evidence, that the petitioner does in fact hold such a degree. Rather, the petitioner entered directly into a predoctoral program at a time when his only college degree was his baccalaureate degree. An independent credential evaluation in the record indicates that the petitioner "is considered to have the achievement of a level of knowledge, competence, and practice that is equal to that of an individual who has a **Master of Science** degree in the specialty occupation in the United States" (emphasis in original). The regulations plainly require either an official academic record of a master's degree, or letters from employers establishing at least five years of post-baccalaureate experience. The petitioner has met neither of these requirements, and therefore the available evidence does not indicate that the petitioner, at the time of filing, qualified as a member of the professions holding an advanced degree.

Counsel has indicated that the petitioner seeks classification as an alien of exceptional ability. The director, in the decision, did not address this claim. Because the petitioner, at the time of filing, had neither an advanced degree nor its defined equivalent, the petitioner must establish exceptional ability in order to qualify for the classification sought and, in turn, consideration for the national interest waiver. The director must determine whether the petitioner meets the regulatory requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii), which relate to exceptional ability.

If the petitioner is able to establish eligibility for the underlying classification, then the petitioner is entitled to full consideration on the merits of his national interest claim; the petitioner's status as a doctoral student is not inherently disqualifying in that regard. The director should consider all the available evidence, including the citation history of the petitioner's several published articles.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.